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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5903

H____L____, on behalf of herself and all others similarly situated,

Plaintiff and Appellant,

v.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,

Defendants and Respondents.

On Appeal From the Supreme Court of the State of Utah

JURISDICTIONAL STATEMENT or in the alternative PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

Appellant filed the instant action challenging the constitutional validity of Section 76-7-304(2) Utah Code Annotated, 1953, on behalf of herself and all others similarly situated, after she was informed by her physician that she was pregnant, that in his best medical judgment it would be appropriate to perform an abortion upon her, that the physician, a social worker and the appellant determined that it would be in

the appellant's best interest not to notify appellant's parents of that decision or the proposed abortion because it would be contrary to his best medical judgment and her best interests but that under the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, he faced criminal sanctions if he proceeded to perform the abortion upon her without providing that notification and was, therefore, unwilling to perform an abortion upon the appellant without providing notice to her parents.

The trial court determined that the phrase "if possible" in Section 76-7-304(2) Utah Code Annotated, 1953, meant if physically possible and ruled that the statute as thus construed did not violate the Constitution of the United States. This decision was appealed to the Supreme Court of the State of Utah which determined that the Trial Court was correct in its interpretation of the language "if possible" and that as thus construed, the Utah Statute was not in violation of the Constitution of the United States as asserted by appellant. (Appendix A)

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Opinion of the Supreme Court of the State of Utah was published on December 6, 1979, (Appendix A). A Notice of Appeal to this Court, (Appendix B) was filed on the 26th day of December, 1979.

This appeal is taken pursuant to the provisions of subsections (2) and/or (3) of Section 1257, Title 28, U.S.C. as the decisions of the Third Judicial District Court in and for Salt Lake County, State of Utah and the Supreme Court of the State of Utah construing and upholding against the challenge of the appellant the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, are in error. Said statute, as thus construed,

violates the Fourteenth Amendment to the Constitution of the United States by effectuating an illegal regulation of and infringement upon the exercise of the right of privacy of the plaintiff and all members of the class which she represents by unduly restricting their right to secure an abortion and a doctor-patient relationship through the imposition of criminal sanctions against a physician who performs an abortion upon such a minor without notifying her parents even if he determines that such action is contrary to his best medical judgment.

Cases in support of this jurisdiction are: Bellotti v. Baird, ____ U.S. ____ 61 L.Ed.2d 797, 99 So. Ct. 3035 (July 2, 1979); Colautti v. Franklin, 439 U.S. 379 (1979); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

QUESTION PRESENTED

DO THE PROVISIONS OF SECTION 76-7-304(2) UTAH CODE ANNOTATED, 1953, WHICH REQUIRE BY THE IMPOSITION OF CRIMINAL SANCTIONS, A PHYSICIAN IN THE STATE OF UTAH, PRIOR TO PERFORMING AN ABORTION ON A MINOR, REGARDLESS OF THE TRIMESTER OF THE MINOR'S PREGNANCY, TO NOTIFY, IF PHYSICALLY POSSIBLE, HER PARENTS, WHEN IT IS DETERMINED BY THE MINOR AND HER TREATING PHYSICIAN TO BE IN HER BEST MEDICAL INTEREST THAT THEY NOT BE SO INFORMED, VIOLATE THE RIGHT OF PRIVACY OF THAT MINOR WHICH RIGHT ENCOMPASSES HER RIGHT TO SECURE AN ABORTION WITHOUT UNDUE INTERFERENCE BY THE STATE AND VIOLATE HER RIGHT TO A DOCTOR-PATIENT RELATIONSHIP FREE OF UNDUE REGULATION BY THE STATE IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of

the United States of America:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 76-7-304(2) Utah Code Annotated 1953:

> "To enable the physician to exercise his best medical judgment, he shall: . . . (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor or the husband of the woman, if she is married."

3. Section 76-7-314(3) Utah Code Annotated, 1953:

> "A violation of any other provision in this act [part] is a class A misdemeanor."

4. Section 76-3-204(1) Utah Code Annotated, 1953:

> "A person who has been convicted of a misdemeanor may be sentenced to imprisonment as follows: (1) In the case of a Class A misdemeanor, for a term not exceeding one year; . . .

5. Section 76-3-301(3) Utah Code Annotated, 1953:

> "A person who has been convicted of an offense may be sentenced to pay a fine not exceeding: . . . (3) $1,000 when the conviction is of a class A misdemeanor; . . .

STATEMENT OF THE CASE

Appellant is a minor who determined that she was in her first trimester of an undesired pregnancy when she filed the complaint in this action. She had consulted with her physician prior to instituting the action and determined that it was in her best medical interest that she be aborted. Her physician and the social worker with whom she consulted confirmed appellant's

opinion that it was in her best medical interests that her parents not be notified either of her decision or of its implementation.[1] However, the physician then advised her that he was unwilling to perform the abortion without notifying her parents because of the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, which made it possible that he would be criminally punished for doing so.

The Trial Court ruled, as the physician believed, that the phrase "if possible" meant if physically possible and that as thus construed, the statute was constitionally valid. This ruling was upheld by the Supreme Court of the State of Utah, which examined the decision of this Court in Bellotti v. Baird, ____ U.S. ____ 61 L.Ed.2d 797, 99 So. Ct. 3035 (1979) and determined that the Statute as thus construed was Constitutionally acceptable. (Appendix A) That decision is not correct and this Court must correct that error. Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 546-548 (D.Maine, 1979)

This Court stated in Roe v. Wade, 410 U.S. 113 (1973) that simplistic characterizations and solutions in abortion cases have to be avoided as there is a very sensitive balance of interests involved. These interests were carefully examined in Roe v. Wade, supra, Doe v. Bolton, 410 U.S. 179 (1973), Colautti v. Franklin, 439 U.S. 379 (1979) and Bellotti v. Baird, supra, in which the sensitive balance regarding a minor was articulated. ____ U.S. at ____ (slip opinion pages 10-23).

In Roe v. Wade, supra, this Court declared the constitutional rule that:

[1] The Utah Supreme Court stated the Trial Court made the finding that appellant made no showing of special detriment if her parents were not notified (Appendix A, P.2,) but this is not correct. Examination of the trial transcript reveals that once the Trial Court determined that the only factual question to be considered was whether or not it was physically possible to contact appellant's parents, all other facts including inquiry into the special circumstances of the appellant were irrelevant. (Trial Transcript pages 8-20)

> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U.S. at 153 (1973).

In Wade, 410 U.S. at 512, and repeatedly since then (Zablocki v. Redhail, 434 U.S. 374, 385 (1978); Maher v. Roe, 432 U.S. 464, 471 (1977); Colautti v. Franklin, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675, 681 (1971); this Court has characterized this privacy interest "fundamental." This characterization has special significance in the Fourteenth Amendment jurisprudence.

> Where certain 'fundamental rights' are involved, . . . regulation limiting those rights may be justified only by 'compelling state interest' . . . and . . . legislative enactments must be narrowly drawn to express only the legitimate interests at stake. Roe vs. Wade, 410 U.S. at 155.

In conjunction with this fundamental right of the Appellant is the woman's right to consult with and secure treatment from a physician to protect her health, Doe v. Bolton, 410 U.S. 179 (1973), Colautti v. Franklin, supra. Constitutional examination of any statute regulating exercise of that right must be close and careful to see that the regulation takes into account the constitutionally protected interests of the pregnant woman whether they are asserted by the woman herself in attacking the statute or by the State in justification of limitations established by the challenged statute. In Bellotti v. Baird, supra, this Court pointed out that this problem is greater for a pregnant minor than an adult and

> " . . . there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible" ____ U.S. at ____ (slip opinion page 19).

This is made more critical in the instant action where the challenged statute imposes criminal sanctions against the treating physician if he violates the statute.

Finally, it must be noted that the States have specifically been ordered not to regulate first trimester abortion by feigning an interest in a woman's health, particularly since the interest in potential life is insignificant at this time. Roe v. Wade, 410 U.S. at 163, 164. The challenged statute effectuated precisely such a regulation in the instant matter.

All of these considerations and the special concerns presented by the case of a pregnant minor were carefully analyzed and balanced by this Court in its decision of Bellotti vs. Baird, supra. The rationale and rulings of this Court contained in that opinion were deliberately rejected by the Utah Supreme Court. Although the challenged statute requires a physician to notify the parents of a minor, even in the circumstances where he and her counselor determined such notification was inappropriate, (Appendix A, pages 3, 9-10) and this is effectuated regardless of the trimester of pregnancy, the Utah Supreme Court, examined the line of authority from Roe v. Wade, supra, to Bellotti v. Baird, supra, and stated:

> From the foregoing one cannot discern a clear constitutional doctrine inhibiting the State from enacting a statute, such as, Section 76-7-304(2), which merely provides for a notification, if possible, of the parents of a minor contemplating an abortion. (Appendix A at page 8)

In reaching this ruling, the Utah Supreme Court evaluated the statute requiring parental notification in light of the constitutional challenges presented in this appeal and rejected them. (Appendix A, pages 2-3) In justifying its decision, the Court stated that only four Justices of this Court concurred in the opinion of the Court in Bellotti v. Baird, supra, and thus they could reach the decision articulated.[2] (Appendix A, page 7)

[2] Four additional Justices of this Court concurred in the judgment based on their determination that the Massachusetts statute as interpreted by the Massachusetts' Supreme Court under challenge in Bellotti v. Baird, supra, was contrary to the ruling in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976). The issue discussed in the Court's Opinion and not reached by those four Justices is now presented in this appeal.

In doing this the Utah Courts rejected the specific ruling of this Court as articulated in Baird ____ U.S. ____, ____ (slip opinion pages 22-25, 27-28) that where the Massachusetts statute had been construed to require notice to be given to every parent, if possible, ____ U.S. ____, ____ (slip opinion page 23), it enacted a statute which ". . . would impose an undue burden upon the exercise by minors of the right to seek an abortion." ____ U.S. ____, ____ (slip opinion page 24).

Another differential asserted by the respondents to the Utah Supreme Court to distinguish the instant matter from Bellotti v. Baird, supra, is that in Bellotti the statute under challenge required the Courts of the State of Massachusetts to make a determination as to whether or not an abortion was in the best interest of a minor and in such a proceeding were required to notify the parents of the action. The Utah Statute presents the question not of a Court's taking such action, but the treating physician. The statute, under threat of criminal prosecution requires the physician to ignore all of those factors which this Court has stated he must consider without interference by the State in Doe v. Bolton, supra., Colautti v. Franklin, supra, and notify his patient's parents if he may physically do so. The statute not only effectuates this improper regulation, it imposes criminal sanctions on the physician if he acts on his constitutionally protected judgment.

The Utah Supreme Court rejected this rationale despite the specific ruling of this Court that:

> "Although it satisfies constitutional standards in large part, §125 falls short of them in two respects:
>
> ***
>
> "Second, it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity

to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interest." ____ U.S. at ____, ____ (slip opinion pages 27-28)

The Utah Courts also rejected an interpretation of the Statute which would have made it Constitutionally acceptable, that is, to interpret the language "if possible" to mean if possible in terms of the best interest of the child in light of the medical, social, psychological and physical factors discerned by the treating physician in examining the minor. (Appendix A pages 9-10.)[3] In the clash of rights and interests, Section 76-7-304(2), Utah Code Annotated, 1953, as construed by the Courts of Utah, establishes an over-broad regulation of the right to privacy in Utah and it must be declared constitutionally invalid. Women's Community Health Center, Inc. v. Cohen, supra.

CONCLUSION

This Court should on appeal, or upon granting of a Writ of Certiorari, reverse the decisions of the Courts of the State of Utah and declare the provisions of Secton 76-7-304(2) Utah Code Annotated, 1953, as construed by the Courts of the State of Utah, to be in contravention to the Fourteenth Amendment to the Constitution of the United States.

Respectfully Submitted,

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[3] The other portion of this provision which requires notification by the physician of the husband of a married woman is also constitutionally invalid. Scheinberg v. Smith ____ F. Supp. ____ (S.D. Fla. 1979); Doe v. Deschamps, 461 F.Supp. 682 (D.Mont. 1976), see Roe v. Rampton, 394 F.Supp. 677 at 684 (D.Utah 1976), aff'd, 535 F.2d 1219 (10th Cir. 1976).

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

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H___L___, on behalf of herself and all others similarly situated,
Plaintiff and Appellant,

v.

Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah,
Defendants and Respondents.

No. 16249

F I L E D

December 6, 1979

Geoffrey J. Butler, Clerk

MAUGHAN, Justice:

Plaintiff, seeking declaratory and injunctive relief, initiated this action for the purpose of having Section 76-7-304(2) declared unconstitutional and to enjoin the enforcement thereof. The trial court found the provision constitutionally valid, and plaintiff appeals therefrom. The judgment is affirmed. All statutory references are to the 1953 Utah Code Annotated, as amended.

Plaintiff, a fifteen year old girl, alleged she was pregnant with an unwanted child. She asserted she was in her first trimester of pregnancy. She claimed she did not wish to inform her parents of her condition, and she believed it to be in her best interests not to impart such information to her parents. She averred, she was determined to secure an abortion after consultation with her counselor.

Plaintiff consulted her physician. He advised her, under Section 76-7-304(2), he could not and would not perform the abortion, without first notifying her parents.

Section 76-7-304, provides:

> To enable the physician to exercise his best medical judgment, he shall:
>
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

(a) Her physical, emotional and psychological health and safety,

(b) Her age,

(c) Her familial situation.

(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

This provision is part of the criminal code, as provided in Section 76-7-314(3). Such may be punishable by imprisonment for a term not exceeding one year, as provided in Section 76-3-204(1); together with a fine not exceeding $1,000, pursuant to Section 76-3-301(3).

Plaintiff proceeded in a class action, asserting the statute constituted an invasion of privacy of each member of the class, whom she represented. Specifically, she claimed the right of privacy encompassed the right to have an abortion, particularly in the first trimester of pregnancy, free from regulation or interference by the State of Utah. She urged the statute unconstitutionally infringed the right of privacy and thus violated the Fourteenth Amendment of the Constitution of the United States. She further asserted the statute was an overly broad regulation, which interfered with her right to consult freely with her treating physician, and to secure treatment, where appropriate, in the effectuation of an abortion without any compelling State interest in such regulation.

In its order denying a temporary restraining order, the trial court found plaintiff had made no special showing of detriment which might result if her parents were notified except for plaintiff's allegations she did not wish to inform her parents, and believed it was in her best interests to withhold this information. The trial court further found the identity of the parents was known or could be easily ascertained by the consulting physician. The trial court concluded, while a State may not regulate or interfere with the decision of an adult woman, and that of her physician, to terminate an unwanted pregnancy during the first trimester, there was no binding decision, which precluded a State from enacting a legislative provision requiring a physician to notify the parents of a minor prior to performing an abortion.

The trial court entered a judgment, dismissing plaintiff's action. The trial court found plaintiff was

unmarried, fifteen years of age, resided at home, was a dependent of her parents, and was in the first trimester of her pregnancy at the time her complaint was filed. The Court further ruled plaintiff was an appropriate representative to represent the class she purported to represent. The trial court interpreted Section 76-7-304(2) as requiring the treating physician to notify, if it be physically possible, viz., if he knows or can determine the identity of the parents of a minor, and he is physically able to notify them, that he do so prior to the performance of an abortion upon a minor. The trial court ruled, as thus interpreted, the statute was valid and did not unconstitutionally restrict the right of privacy of a minor to secure an abortion, or to enter into a doctor-patient relationship.

On appeal, plaintiff contends Section 76-7-304(2), as interpreted by the trial court, violates the Fourteenth Amendment of the Constitution of the United States. She urges, in the first trimester, the State cannot interfere at all with the fundamental interest of the pregnant woman in making an abortion decision in consultation with her physician. In the alternative, plaintiff contends this overly-broad regulation of the exercise of constitutionally protected rights can be so construed as to be valid. Specifically, plaintiff urges the term "if possible" be interpreted as conferring on the physician and patient the discretion to determine if medically, socially, psychologically, and physically it would be appropriate to notify the minor's parents.

In Roe v. Wade[1] the Court ruled the right of privacy, found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, is broad enough to encompass a woman's decision as to whether to terminate her pregnancy. This right of personal privacy, including the abortion decision is not unqualified and must be considered against state interests in regulation. However, a regulation limiting a fundamental right may be justified only by a compelling state interest. Furthermore, such legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

The Court ruled in Roe v. Wade,[2] with respect to the stage prior to approximately the end of the first trimester, "The attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

It further held the State may place increasing restrictions on abortion as the period of pregnancy lengthens,

1. 410 U.S. 113, 153.
2. 410 U.S. 163.

so long as those restrictions are tailored to the recognized state interests. The Court stated:

> . . . The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra professional are available.[3]

In the companion case of Doe v. Bolton[4] the Court ruled the abortion determination, so far as the physician is concerned, is made in the exercise of his best clinical judgment in the light of all the attendant circumstances. The physician may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him. His "medical judgment may be exercised in the light of all factors physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient. All these factors relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."

The aforecited factors, which the physician may consider in making his best medical judgment were incorporated in subsection (1) of Section 76-7-304, the challenged statute. The notification provision of subsection (2) is substantially and logically related to the factors in subsection (1), for it is the parent of the minor, who would frequently possess additional information, which might prove invaluable to the physician in exercising his "best medical judgment." The notification provision merely gives the parents the option to respond and to consult with the physician and child. The statute does not confer a veto-power on anyone to overrule the determination of the doctor and his patient.[5]

Neither the Roe nor the Doe decision considered the issue of a pregnant minor seeking an abortion. In Planned Parenthood of Central Missouri v. Danforth[6] the

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3. 410 U.S. 165-166.
4. 410 U.S. 179, 191-192 (1972).
5. The issue of parental consent for a surgical procedure on a minor child has not been presented to the court and will not be discussed.
6. 428 U.S. 52, 74-75 (1976).

Court ruled the State may not impose a blanket provision, requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. The Court explained the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary veto over the decision of the physician and his patient, to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

The Court stated:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. [Citations] The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. [Citations] It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or person in loco parentis that is not present in the case of an adult.

It was urged before the court the State had a substantial interest in safeguarding the family unit and parental authority. The court responded it could not conclude conferring a veto power on the parent would strengthen the family unit or enhance parental authority and control where the minor and nonconsenting parent were so fundamentally in conflict, and the existence of the pregnancy already had fractured the family structure.

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

The Court did qualify its holding by stating it had not suggested every minor, regardless of age or maturity, might give effective consent for termination of her pregnancy. The fault of the challenged Missouri statute was it imposed a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy; and did so without a sufficient justification for the restriction, thus violating the strictures of Roe and Doe.

In Carey v. Population Services International[7] the Court cited Planned Parenthood and stated the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults. The Court reiterated the standard, that State restrictions inhibiting privacy rights of minors are valid only if they serve a significant state interest, which is not present in the case of an adult.

The concurring opinion of Justice Powell in Carey is of particular significance in an attempt to understand his opinion in the Court's most recent decision concerning a minor's right to an abortion, Bellotti v. Baird.[8] In Carey, he said:

> Requiring minors to seek parental guidance would be consistent with our prior cases. In Planned Parenthood, we considered whether there was 'any significant state interest in conditioning [a minor's] abortion [decision] on the consent of a parent or person in loco parentis that is not present in the case of an adult.' [Citation] Observing that the minor necessarily would be consulting with a physician on all aspects of the abortion decision, we concluded that the Missouri requirement was invalid because it imposed 'a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and [did] so without a sufficient justification for the restriction.' Ibid. But we explicitly suggested that a materially different constitutional issue would be presented with respect to a statute assuring in most instances consultation between the parent and child. [Citations]
>
> A requirement of prior parental consultation is merely one illustration of permissible regulation in this area. . . .[9]

In Bellotti v. Baird[10] the issues of consent and notification, where a minor desired an abortion, were inextricably intertwined. However, there is language in the main opinion which would appear to hold unconstitutional a statu-

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7. 431 U.S. 678, 693 (1977).
8. ___ U.S. ___, 61 L.Ed.2d 797, 99 S.Ct. 3035, July 2, 1979.
9. 431 U.S. 709-710.
10. note 8, supra.

tory provision requiring parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.[11]

Under the challenged statutory scheme in Bellotti, all minors were required to obtain the consent of both parents or in the alternative the consent of the court prior to procuring an abortion. If the minor elected to seek court consent, there was a mandatory notification of the parents of the pending court action. It was within this context Justice Powell ruled the blanket notification requirement unconstitutional. Significantly, a majority of the court refused to join in Justice Powell's opinion. Justice White dissented, and three Justices joined in the opinion of Justice Stevens, concurring in the judgment.

Justice Stevens stated:

> In short, it seems to me that this case is governed by Danforth; to the extent this statute differs from that in Danforth, it is potentially even more restrictive of the constitutional right to decide whether or not to terminate a pregnancy. Because the statute has been once authoritatively construed by the Massachusetts Supreme Judicial Court, and because it is clear that the statute as written and construed is not constitutional, I agree with Mr. Justice Powell that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion.[12]

In an explanatory footnote, number 4, Justice Stevens stated:

> Until and unless Massachusetts or another State enacts a less restrictive statutory scheme, this Court has no occasion to render an advisory opinion on the constitutionality of such a scheme. A real statute rather than a mere outline of a possible statute - and a real case or controversy may well present questions that appear quite different from the hypothetical questions

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11. at p. 818 of 61 L.Ed.2d.
12. at p. 797 of 61 L.Ed.2d.

> Mr. Justice Powell has selected to address. Indeed, there is a certain irony in his suggestion that a statute that is intended to vindicate 'the special interests of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child,' see ante, at ___, 61 L.Ed.2d 811, need not require notice to the parents of the minor's intended decision. That irony makes me wonder whether any legislature concerned with parental consultation would, in the absence of today's advisory opinion, have enacted a statute comparable to the one my Brethren have discussed.
>
> In his dissent, Justice White stated:
>
> > . . . Going beyond Danforth, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the 'best interests' of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.[13]

From the foregoing one cannot discern a clear constitutional doctrine inhibiting the State from enacting a statute, such as, Section 76-7-304(2), which merely provides for notification, if possible, of the parents of a minor contemplating an abortion.

Under Danforth, the issue then is whether the statute serves "any significant state interest" that is not present in the case of an adult, which would justify as a condition precedent to the obtaining of an abortion by a minor, the notification of her parents. First and foremost, the statute does not per se impose any restriction on the minor as to her decision to terminate her pregnancy. Second, as mentioned ante, the parent is in a position to provide valuable information concerning the factors which the physician may consider in exercising his best clinical judgment.

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13. at p. 822 of 61 L.Ed.2d.

Third, the State has a special interest in encouraging (but does not require), an unmarried pregnant minor to seek the advice of her parents in making the important decision as to whether or not to bear a child.

Justice Powell in his opinion in Bellotti stated there were "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing."[14] In expanding on this third reason, he observed, the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. Further, it is a cardinal principle of this nation that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. He stated:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society, meaningful and rewarding. Under the Constitution, the State can 'properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility.' [Citation][15]

The Legislature in enacting Section 76-7-303(2) has strictly limited parental involvement in the minor's abortion decision. The provision does not confer on the parent an absolute and arbitrary veto, which was found impermissible in Danforth. There is no basis to conclude this provision unduly burden's the constitutional right of the minor woman, in consultation with her physician, to choose to terminate her pregnancy; thus, it is constitutional.

Plaintiff further urges the term "if possible" in subsection (2) of Section 76-7-304 be construed as conferring on the consulting physician discretion to determine if

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14. at p. 807 of 61 L.Ed.2d.
15. at pp. 810-811 of 61 L.Ed.2d.

medically, socially, psychologically, and physically, it would be appropriate to notify the minor's parents.

There is no ambiguity in the term "if possible" within the context of subsection (2); and, therefore, there is no basis to construe the term beyond its literal, plain meaning.[16] The trial court's interpretation is consistent with the clearly expressed legislative intent, viz., the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location, and it is feasible or practicable to give them notification.[17] Furthermore, within the context of what is reasonable under the circumstances, the time element is an important factor, for there must be sufficient expedition to provide an effective opportunity for an abortion.[18]

WE CONCUR:

J. Allan Crockett, Chief Justice

D. Frank Wilkins, Justice

Gordon R. Hall, Justice

I. Daniel Stewart, Justice

16. ". . .there is nothing to construe where there is no ambiguity in the statute." State v. Archuletta, Utah 529 P.2d 911, 912 (1974).
17. See 20 Words and Phrases, 1979 Supplement, p. 8, "If Possible."
18. Bellotti v. Baird, at p. 814 of 61 L.Ed.2d.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

H___L___, on behalf of herself and all others similarly situated, Plaintiff and Appellant, v. Honorable Scott M. Matheson, individually and in his capacity as Governor of the State of Utah, and Honorable Robert B. Hansen, individually and in his capacity as Attorney General of the State of Utah, Defendants and Respondents.	)	No. 16249

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that H___L___, appellant above-named, individually and on behalf of a class that she represents, hereby appeals to the Supreme Court of the United States the final Judgment of the Supreme Court of the State of Utah, as heretofore rendered and filed in this matter on the 6th day of December, 1979, affirming the Decision of the Trial Court as entered on the 26th day of December, 1978.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2) and (3).

II. The following question is presented by this Appeal and/or Petition for Writ of Certiorari:

Do the provisions of Section 76-7-304(2) Utah Code Annotated 1953, which require by the imposition of criminal sanctions, a physician in the State of Utah, prior to performing an abortion on a minor, regardless of the trimester of the minor's

pregnancy, to notify, if physically possible, her parents, when it is determined by the minor and her treating physician to be in her best medical interest that they not be so informed, violate the right of privacy of that minor which right encompasses her right to secure an abortion without undue interference by the State and violate her right to a doctor-patient relationship free of undue regulation by the State in contravention of the Fourteenth Amendment to the Constitution of the United States.

III. The Clerk of the Utah Supreme Court has been ordered to hold the Record on Appeal in this matter pending direction from the Clerk of the Supreme Court of the United States.

DATED this 26 day of December, 1979.

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of and for
PARSONS, BEHLE & LATIMER
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PROOF OF SERVICE

I, Lillian Hunsaker, as a secretary in the offices of Parsons, Behle & Latimer, Attorneys for Appellant herein, depose and say that on the 26th day of December, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Paul M. Tinker, Assistant Attorney General Attorney for Respondents herein, by depositing the same in a United States mail box with first class postage prepaid addressed to Paul M. Tinker
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114.

Secretary

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 21st day of December, 1979.

Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:

3.